International Longshore Workers Union, Local No. 62-B *and* Alaska Timber Corporation. Case 19-CD-385

May 27, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Alaska Timber Corporation (herein called ATC), alleging that International Longshore Workers Union, Local No. 62-B (herein called Local 62-B), had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring ATC to assign certain work to employees it represents rather than to ATC's unrepresented employees.

Pursuant to notice, a hearing was held before Hearing Officer Rudolf F. Hurtado on June 25, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Local 62-B and ATC filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.[1]

Upon the basis of the entire record in this case, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

Since approximately 1969, ATC, located in Klawock, Alaska, has been in the business of manufacturing cants and dimension lumber for sale primarily to Japanese concerns. The parties stipulated that during the past fiscal or calendar year ATC's gross revenue from all sales or performance of services exceeded $500,000 and its gross revenue from sales or performance of services directly to customers outside the State exceeded $50,000. We find that ATC is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. LABOR ORGANIZATION

The parties stipulated, and we find, that Local 62-B is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

ATC's operations are located on a small island approximately 30 miles off the coast of mainland southeast Alaska. ATC is engaged in the processing of lumber, and its principal business consists of selling heavy timber, known as cants, to Japanese customers. In addition to its mill, ATC also owns and operates an adjacent private docking facility. All products sold by ATC are loaded from this dock onto ships owned or chartered by ATC's customers. ATC employs approximately 50 persons. Forty-five of these employees are mill employees involved in the cutting of timber.

Prior to January 1981, ATC sold its lumber to customers on a F.A.S. (free alongside) basis, meaning that upon ATC's delivery of the goods alongside the ship the customer assumed the responsibility of loading it onto the ships. Most of the loading work was contracted by ATC's customers to Southeast Stevedoring Company (SES), which maintained a collective-bargaining agreement with Local 62-B.[2] ATC had no contractual relationship at any relevant time herein with either SES or Local 62-B.

In January 1981,[3] ATC decided, based on a number of factors considered by us in our discussion, *infra*, that it would negotiate sales on a F.O.B. (free on board) basis. Such a sales basis means that the seller, ATC, would assume the responsibility of loading the timber onto the ship. Approximately 1 year before it implemented its decision, ATC advised SES that it planned to use its own unrepre-

[1] Local 62-B's motion to reopen the record is denied. Local 62-B seeks to adduce evidence that on October 8, 1981, the Employer, subsequent to the close of the hearing, voluntarily assigned work in dispute to employees represented by Local 62-B. It asserts that this assignment supports its contention that the Employer had an insufficient number of its own employees to perform the loading operations. At the time of this assignment, the Employer was apparently unaware that a Sec. 10(l) injunction, enjoining Local 62-B's picketing of the Employer's facility, had been issued by the United States District Court for the District of Alaska. The Acting Regional Director for Region 19 filed a statement in which he stated that, prior to Local 62-B's motion to reopen, neither the Region nor the Employer had received notice of the issuance of the injunction. Notice of the injunction was sent to Local 62-B and to the Anchorage, Alaska, Resident Office. In any event, even were we to allow evidence into the record of this single work assignment, our award of the work in dispute would not differ.

[2] On October 9, 1973, Local 62, the parent local of Local 62-B, was certified to represent a bargaining unit consisting of all longshore employees of SES "at its Klawock, Alaska stevedoring operation."

[3] ATC's mill employees, both prior and subsequent to January 1981, have performed the work of delivering the lumber from the mill to the dock, using forklifts after strapping together the lumber with bands of steel.

sented employees to load the lumber onto the ships, in accordance with its planned F.O.B. cost basis.

On January 10, 1981, two representatives of Local 62-B spoke with ATC's president, Edward E. Head, and sought to persuade him to permit its members to load the ships. Head explained to the Local 62-B representatives that ATC had experienced problems with crew shortages and, according to Head, the Local 62-B representatives stated "they could bring crews in from other cities, and would be able to load it without local people." When Head indicated that this would not be satisfactory, the Local 62-B representatives sought to convince Head to consider "hiring the ILWU," and stated to Head that ATC "didn't have to use" SES. When Head refused to be swayed from his decision to use ATC's unrepresented employees, Local 62-B's representatives informed him that the loading operation would be picketed. On January 11, 1981, Local 62-B picketed the loading of a ship, *The Eastern Hope*, by ATC's own employees.

B. *The Work in Dispute*

The parties stipulated, and we find, that the work in dispute herein is the loading of products for shipment at ATC's private docking facility in Klawock, Alaska.

C. *Contentions of the Parties*

ATC contends that it has the absolute right to assign the disputed work to its own employees; alternatively, it argues that a consideration of the relevant factors warrants an assignment of the work to its employees. It also contends that Local 62-B's picketing was a violation of Section 8(b)(4)(D) of the Act.

Local 62-B initially claims that the present proceeding is not a jurisdictional dispute within the meaning of either Section 10(k) or 8(b)(4)(D) of the Act, thereby precluding the Board from making an award in this case pursuant to statutory authority. Local 62-B maintains that any objective that it might have in picketing is limited solely to the preservation of the disputed work, which had been performed for several years by employees it represents. Alternatively, Local 62-B contends that even if there were Section 10(k) jurisdiction in this instance, all of the factors commonly taken into consideration by the Board in cases of similar nature would require awarding it the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

Neither party disputes that on January 11, 1981, Local 62-B picketed the loading operations of ATC at its private dock, at a time when ATC's unrepresented employees were performing the loading work at issue herein, and that such picketing continued during the entire loading process. According to ATC's President Head, prior to the picketing, representatives of Local 62-B had demanded that ATC permit its members to load the ships by seeking to have ATC directly hire "the ILWU," and by indicating that ATC "didn't have to use" SES, whose employees Local 62-B represented in a bargaining unit limited to SES's employees "at its Klawock, Alaska stevedoring operation." In addition, according to Head, Local 62-B offered to bring in crews from other cities and sought to perform the loading work "without local people."[4] In view of these circumstances, it is evident that Local 62-B sought to compel ATC to assign the work in dispute from one group of employees, ATC's unrepresented employees, to another group of employees, the employees represented by Local 62-B and/or the ILWU. Based on the foregoing, and the record as a whole, we find that an object of Local 62-B's picketing was to force or require the assignment of the disputed work to employees represented by it. Accordingly,

---

[4] For these reasons, we are unpersuaded by our dissenting colleague's contention that the picketing was conducted pursuant to a valid work preservation objective. First, an object of Local 62-B clearly was to compel ATC to hire Local 62-B and/or ILWU members, and not merely to return to its previous mode of operation. Accordingly, the record simply does not support his contention that Respondent merely sought "to persuade the Employer to return to its former method of billing." As noted by our dissenting colleague in *Chauffeurs, Teamsters and Helpers, Local 331, International Brotherhood of Teamsters, Chauffeurs*, Warehousemen and Helpers of America (Bulletin Company), 139 NLRB 1391, 1396, fn. 2 (1962), (in which he joined in finding no jurisdictional dispute), distinguishing *Local 991, International Longshoremen's Association, et al. (Union Carbide Chemical Company)*, 137 NLRB 750 (1962) (in which a jurisdictional dispute was found):

> In this situation [the Union] is seeking to compel [the Employer] to go back to its old mode of operation; it is not seeking to compel [the Employer] to hire its members.
>
> In *Union Carbide*, on the other hand, the ILA, while protesting the loss of work suffered by its members as a result of Union Carbide's decision to change its mode of operation, sought to compel Union Carbide to hire its members to perform the work under the changed method of operations.

Secondly, Local 62-B's object was not limited to preserving bargaining unit work for employees at SES's Klawock, Alaska, operation, as evidenced by its seeking employment at ATC for crews "from other cities" and "without local people." Accordingly, an object of Local 62-B clearly was "calculated to satisfy Union objectives elsewhere." *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

we find that reasonable cause exists to believe that Section 8(b)(4)(D) of the Act has been violated.[5]

The parties stipulated, and we find, that no agreed-upon method exists for the voluntary adjustment of the dispute to which all parties are bound. Accordingly, we find the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[6] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[7]

1. Employer past practice

Prior to January 1981, ATC did not employ any employees to load its lumber products onto ships. However, ATC's customers would normally contract for the services of SES, and the longshoremen represented by Local 62-B would load onto ships lumber products originating from ATC. This factor favors awarding the work to employees represented by neither Local 62-B nor ATC's own employees inasmuch as ATC did not directly utilize employees represented by Local 62-B in the past and since it was only after ATC's change in its method of operation that it utilized its own employees to load its lumber products onto ships.

2. Employer preference

ATC prefers to utilize its own employees rather than those of SES in performing the loading operation, a factor which favors awarding the work in dispute to ATC's unrepresented employees.

3. Industry and area practice

Local 62-B introduced testimony to the effect that area concerns, similar in nature to ATC, utilized longshoremen employed by SES and other stevedoring concerns, and that no other companies used their own mill to load the ships. ATC did not produce any evidence at the hearing to support its contention that there ws no industry or area practice in this regard. Accordingly, we find that the use of longshoremen to load lumber products onto the ships is an area practice. There is insufficient evidence to determine if there is an industry practice. This factor favors awarding the work, although minimally, to employees represented by Local 62-B.

4. Job skills and efficiency

It would appear that the skills required to load a ship with timber products are minimal ones that could be acquired after a few days of on-the-job training. Local 62-B's secretary-treasurer testified that it would have taken 29 Local 62-B longshoremen from 5 to 7 days to load *The Eastern Hope*. ATC loaded the same ship in 8 days using approximately 22 of its own employees.[8] Even though it took the ATC crew longer to load the ship than it would have taken the Local 62-B crew, we note that ATC used a crew of one-third fewer workers than that of Local 62-B and that, initially, ATC's employees could not be expected to be as efficient as the longshoremen represented by Local 62-B. Accordingly, we find that job skills and efficiency are neutral factors, favoring award of the work to neither group of employees.

5. Economy

ATC cites four distinct factors in claiming that the use of its employees will result in a more economical operation. They are: the likelihood that demurrage[9] will be eliminated; the substitution of one supervisor for the four supervisors utilized by Local 62-B in accordance with the contract it had with SES; the efficiency of having all employees subject to the same supervision; and, the surcharge that SES charges for the development of its crew. Local 62-B, on the other hand, relies on the testimony of Edward Head, ATC's president, who testified that he pays his employees wages higher than the union scale rates, to support its contention that

[5] We also disagree with our dissenting colleague's contention that the present case is controlled by *International Longshoremen's and Warehousemen's Union Local 8 (Waterway Terminals Company)*, 185 NLRB 186 (1970), reversed 467 F.2d 1011 (9th Cir. 1972). In contrast to Waterway Terminals Company, ATC did not have a contractual or direct relationship with the employing entity, SES, nor did it hire any new employees to perform work formerly performed by Local 62-B members. The contracting of SES's services, and therefore the employment of employees represented by Local 62-B, was entirely within the discretion of the ship's charter and not ATC. Thus, ATC's role in the loss of employment by Local 62-B members was, at most, indirect and pursuant to a fundamental change in its mode of operations whereby ATC sought to provide additional services to its customers within its existing employee complement. Thus, this is not a case in which an employer has merely reallocated work among its employees or supplanted one group of employees with another. See *Local 62, International Longshoremen's and Warehousemen's Union (Chevron, U.S.A., Inc.)*, 237 NLRB 835 (1978).

[6] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[7] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[8] ATC's other employees were used in the daily operation of the mill and also in transporting the lumber from the mill to alongside the ship, tasks which they performed prior to the Employer's change to an F.O.B. basis of sales and delivery of the lumber.

[9] Demurrage is the daily surcharge that the ship's charterer must pay to the owner of the ship for additional days that the ship is docked. The daily fee ranges from $8,000 to $10,000.

an award of work to its members would actually be more economical.

Local 62-B's argument is not persuasive since Head testified that the wage rates paid were only "a few cents over" the union scale. Also, this argument fails to take into consideration the fee that must be paid to SES for the stevedoring service, a factor relied on by ATC. An additional factor cited by ATC was the daily demurrage charge that had to be paid as a result of insufficiently staffed crews in the past. Although Head acknowledged that demurrage fees were a rare occurrence in this general area, ATC could lose its cost advantage, if any, over local competitors if the ship's charterer had to pay demurrage charges due to an insufficiently staffed crew. The other factors cited by ATC concerning reduced and common supervision also militate in favor of awarding the work to ATC's employees.

6. Safety

Although evidence was adduced which established that the loading in question is not completely free from danger, we do not find, as stated by Local 62-B, that loading by ATC's employees "created substantial danger of physical injury to everyone involved." We come to this conclusion in light of our discussion concerning the skills required to perform such an operation, *supra*. Accordingly, this factor favors award of the work to neither group.

Conclusion

Upon the record as a whole, and after consideration of all relevant factors involved, we conclude that the unrepresented employees of Alaska Timber Corporation are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference and assignment and economy of operation, all of which favor an award of the work to ATC's employees. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Alaska Timber Corporation are entitled to perform the loading of products for shipment at ATC's docking facility in Klawock, Alaska.

2. International Longshore Workers Union, Local 62-B, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act, to force or require Alaska Timber Corporation to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Longshore Workers Union, Local 62-B, shall notify the Regional Director for Region 19, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

MEMBER FANNING, dissenting:

Contrary to the view of my colleagues, I do not believe the facts here present a jurisdictional dispute. I would quash the notice of hearing.

The Supreme Court, in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), recognized that workers may picket an employer without running afoul of the proscriptions of Section 8(b)(4) of the Act, provided that the objective of the picketing is to preserve lost work. In the present case, the work involved is the loading of lumber products onto ships at ATC's dock. Prior to 1981, ATC had sold its products on a F.A.S. (free alongside) basis. The lumber was loaded onto the ships by SES employees represented by ILWU. The record is not clear as to the method of arranging for the services of SES, but it does appear that, at times, ATC arranged for SES to load the ships rather than the buyer. In any event, the identity of the contracting party is not determinative of the outcome of this case.

Beginning in 1981, ATC change from F.A.S. to F.O.B (free on board), which meant rather than delivering the lumber to the dock alongside the ship, it would, as of January 1981, load the material onto the ship. The Employer has cited various factors in support of its decision to use its own employees to perform the loading, including its fear that short crews supplied by SES would lead to increased demurrage charges, since it would take longer to load the ships. However, the record reveals that the Employer had never complained of an insufficient number of workers and that, in the past, SES had supplied crews sufficient in size and number to unload both a ship at ATC's dock and also a ship of a nearby shipping concern. The Employer's president testified that demurrage charges had occurred infrequently and did not specifically state that they were related to any crew shortage.

The Southeast Stevedoring employees represented by Local 62-B lost the work in question as a result of ATC's paper change in its method of bill-

ing and delivery of lumber. Local 62-B is merely attempting to retrieve the jobs which were supplanted by such a change.[10] This case, therefore, may be distinguished from the majority's holding in *Local 62, International Longshoremen's and Warehousemen's Union (Chevron, U.S.A., Inc.)*,[11] In *Chevron*, the majority went to great lengths to explain how Chevron had altered its basic method of transporting goods. While acknowledging that the final objective remained the same, the majority stated that "the means for accomplishing that objective [had] undergone a significant metamorphosis." 237 NLRB at 837, fn. 2. Here, we have no metamorphosis. The timber is being loaded as before. The Employer has decided merely to change its method of billing for the lumber products. The method of delivery has not changed. Picketing by Local 62-B to retrieve lost jobs is pursuant to a work preservation objective. For like reasons, the present case is similar to *International Longshoremen's and Warehousemen's Union Local 8 (Waterway Terminals Company)*.[12] Although there is no collective-bargaining relationship between ATC and the employees represented by Local 62-B, there is no dispute that these employees had, for a number of years, performed the work in question. When the work was taken away from them they engaged in a lawful form of protest with the sole objective of preserving that work.

As I stated in my dissent in *Chevron, supra*, many strikes involve disputes over the assignment of work but that fact alone does not convert an otherwise lawful strike into an unlawful jurisdictional strike. Although the present case involves picketing rather than a strike, the analysis of the situation should be no different. Employees who have lost their jobs through no fault of their own have a fundamental right to protest such loss. The question is whether these employees lost the protections of Sections 7 and 13 of the Act when they picketed because work normally performed by them was awarded to other employees. I would find that the picketing by Local 62-B of the ATC dock, the location of the employees' lost jobs, was solely for the object of preserving the work of loading lumber for the employees who had been performing it, and that such a dispute is not the type Congress intended the Board to resolve pursuant to Sections 8(b)(4)(D) and 10(k) of the Act.

[10] Contrary to the position of my colleagues, *Local 991, International Longshoremen's Association, et al. (Union Carbide Chemical Company)*, 137 NLRB 750, is not dispositive of the present matter. In *Union Carbide*, the ILA picketed the employer pursuant to its claim of loading work at the employer's container dock. However, in that case, the work in question had never before been performed by employees represented by the ILA. The work involved the loading of containerized cargo onto ships, a novel mode of operation in the early 1960's. The employer sought to utilize its own employees, represented by the area Trades Council, to perform the loading. The employer leased an additional dock area to perform the new loading. It was undisputed that the employer and the Trades Council, pursuant to collective-bargaining agreements, had always considered that the contracts covered shipping, as well as plant, employees. In fact, "[w]hen the prospect of certain dockwork became known in 1960, both parties agreed that the work was covered by the contract, but no new job classifications were added since the work was to be performed by employees already covered by the agreement." 137 NLRB at 752-753. The employer rejected the ILA's assertion that its members were entitled to perform the work in question, maintaining that the work at the container dock was intermittent and, when not needed at the dock, its employees were assigned to other operations in the plant. The employer also maintained that the work at the container dock was an extension of shipping functions then carried on and an integral part of the plant's operation. Thus, the ILA's contention that the picketing was conducted pursuant to a valid work preservation objective was rejected by the Board. As stated, the employer and the Trades Council had previously envisioned that the work in question would be performed by the employer's own employees and the specific work in dispute had not been previously performed by employees represented by the ILA. In such a situation, the claim of the ILA, if satisfied, would have extended beyond the retrieving of lost jobs.

The fact situation encountered in *Union Carbide* is to be contrasted with the present case. Here, the loading of ATC's products is proceeding in exactly the same manner as before. ATC supplanted one group of employees, those represented by Local 62-B who had previously performed the work, with another group, its own employees. As we said in *Safeway Stores, Incorporated*, 134 NLRB 1320, 1322 (1961), "Certainly it was not intended that every time an employer elected to . . . supplant one group of employees with another, a "jurisdictional dispute" exists within the meaning of [Secs. 8(b)(4)(D) and 10(k)]." Also, like *Safeway*, there is not present here any real competition between unions or groups of employees for the work. The real dispute is between Local 62-B and ATC and concerns only Local 62-B's attempt to retrieve the work of employees it represents. We also stated in *Safeway* (at 1323):

> But the normal situation demonstrates how far removed is the instant case where the employer by his unilateral action *created* the dispute by transferring work away from the only group claiming the work. We venture the suggestion that nothing in the lengthy legislative history of the jurisdictional dispute cases can be read as suggesting that Congress conceived this as the type of dispute to which those provisions were to be regarded as applicable.

The *only* change in the present situation is in the method of billing. The present situation is thus more similar to that encountered in *Chauffeurs, Teamsters and Helpers, Local 331, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bulletin Company)*, 139 NLRB 1391 (1962), a case also noted by my colleagues. Here, Respondent's picketing seeks to persuade the Employer to return to its former method of billing—a valid form of picketing to regain lost jobs.

[11] 237 NLRB 835.

[12] 185 NLRB 186 (1970), reversed 467 F.2d 1011 (9th Cir. 1972).